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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

DORNIER GMBH, a German Corporation, *Petitioner,*

v.

DONALD E. ELLIOTT and EVELYN L. ELLIOTT, individually and as Personal Representatives of the ESTATE OF SCOTT v. ELLIOTT, DECEASED, BUSH AIR, INC., an Alaska corporation, and WIEN AIR ALASKA, INC., an Alaska corporation, *Respondents.*

DORNIER, A. G., and DORNIER, GMBH, *Petitioners,*

v.

AVONNA L. SWEANEY, Personal Representative of the ESTATE OF GARY B. ROBERTS, BUTLER AVIATION COMPANY, HOME OIL COMPANY, LIMITED, FIELD AVIATION COMPANY, LIMITED, CLIFFORD L. SHORT, RAY E. FERGUSON, FRANK P. FERGUSON, DON FERGUSON, JOE FERGUSON, DON'S SAFARI FLYING SERVICE, KOTZEBUE FLYING SERVICE, INC., ALASKA CENTRAL AIRWAYS, INC., GEORGE GRANT, and AIRPARTS, INC., *Respondents.*

DORNIER, A. G., and DORNIER, GMBH, *Petitioners,*

v.

BUSH AIR, INC., an Alaska corporation, BUTLER AVIATION COMPANY, HAMILTON AVIATION COMPANY, HOME OIL COMPANY, FIELD AVIATION COMPANY, LIMITED, CLIFFORD L. SHORT, RAY E. FERGUSON, FRANK P. FERGUSON, DON FERGUSON, JOE FERGUSON, DON'S SAFARI FLYING SERVICE, FERGUSON'S FLYING SERVICE, KOTZEBUE FLYING SERVICE, INC., ALASKA CENTRAL AIRWAYS, INC., GEORGE GRANT, and AIRPARTS, INC., *Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALASKA

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QUESTIONS PRESENTED

Did the courts of the State of Alaska violate due process in asserting personal jurisdiction over an alien defendant who lacks the required minimum contacts with the State of Alaska?

Did the courts of the State of Alaska incorrectly apply the stream of commerce theory of jurisdiction in violation of this Court's mandate in *World-Wide Volkswagen Corporation* v. *Woodsen*, 444 U.S. 286 (1980)?

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
OPINIONS BELOW	2
JURISDICTION	2
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	3
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT:	
I. The Decision Of The Court Below Violated The Petitioner's Right To Due Process Of Law In That It Permitted An Assertion Of Jurisdiction Despite The Lack Of Minimum Contacts By The Defendant With The State Of Alaska	8
II. The Courts Of The State Of Alaska Improperly Applied The Stream Of Commerce Theory Of Jurisdiction In Violation Of This Court's Recent Decision In *World-Wide Volkswagen Corporation* v. *Woodsen*, 444 U.S. 286 (1980)	13
CONCLUSION	18
APPENDIX A	1a
APPENDIX B	3a
APPENDIX C	9a
APPENDIX D	11a

TABLE OF AUTHORITES

CASES:	PAGE
Amba Marketing Systems, Inc. v. *Jobar International*, 551 F.2d 784 (9th Cir. 1977)	10, 11
Data Disc, Inc. v. *Systems Technology Associates, Inc.*, 557 F.2d 1280 (9th Cir. 1977)	11
Hanson v. *Denckla*, 357 U.S. 235 (1958)	9
International Shoe Co. v. *Washington*, 326 U.S. 310 (1945)	9
L. B. Reeder Contractors of Arizona v. *Higgins Industries*, 265 F.2d 768 (9th Cir. 1959)	10
Leasco Data Processing Equipment Corp. v. *Maxwell*, 468 F.2d 1326 (2d Cir. 1972)	15
Schaffer v. *Heitner*, 433 U.S. 186 (1977)	9
World-Wide Volkswagen v. *Woodsen*, 444 U.S. 286 (1980)	7, 11, 12, 14, 15, 17

INDEX TO APPENDIX

		PAGE
APPENDIX A	Supreme Court Of Alaska, Order, Dated March 24, 1981, In *Dornier, A.G.*, And *Dornier, GmbH, Petitioners*, v. *Donald E. Elliott, et al., Respondents*	1a
APPENDIX B	Supreme Court Of Alaska, Fourth Judicial District, Memorandum Decision, Dated January 14, 1981, In *Donald E. Elliott, et al., Plaintiff*, v. *Dornier, GmbH, et al., Defendants; Avonna L. Sweaney, Plaintiff*, v. *Dornier, A.G., Dornier, GmbH, et al., Defendants; Bush Air, Inc., Plaintiff*, v. *Dornier, A.G., Dornier, GmbH, et al., Defendants*, Consolidated Actions For Purposes Of Dornier's Motion To Dismiss For Lack Of Personal Jurisdiction	3a
APPENDIX C	Superior Court Of Alaska, Fourth Judicial District, Order Denying Reconsideration, Dated January 28, 1981, In *Donald E. Elliot, et al., Plaintiff*, v. *Dornier, GmbH, et al., Defendants; Avonna L. Sweaney, Plaintiff*, v. *Dornier, A.G., Dornier, GmbH, et al., Defendants; Bush Air, Inc., Plaintiff*, v. *Dornier, A.G., Dornier, GmbH, et al., Defendants*, Consolidated Actions For Purposes Of Dornier's Motion To Dismiss For Lack Of Personal Jurisdiction	9a
APPENDIX D	Constitutional Provisions And Statutes ...	11a

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALASKA

Petitioners, Dornier, GmbH, and Dornier, A.G., respectfully request that a writ of certiorari issue to review the order of the Supreme Court of the State of Alaska dated March 24, 1981 (Appendix A), denying Dornier's Petition for Review of a decision by the Superior Court of the State of Alaska, Fourth Judicial District at Bethel, based on the Alaska long-arm statute which extends jurisdiction over nonresidents.

OPINIONS BELOW

The relevant opinions are unreported, and are attached as appendices as follows:

APPENDIX A — Supreme Court of Alaska, Order, dated March 24, 1981, in *Dornier, A.G.*, and *Dornier, GmbH, Petitioners,* v. *Donald E. Elliot, et al., Respondents.*

APPENDIX B — Superior Court of Alaska, Fourth Judicial District, Memorandum Decision, dated January 14, 1981, in *Donald E. Elliott, et al., Plaintiff,* v. *Dornier, GmbH, et al., Defendants*; *Avonna L. Sweaney, Plaintiff,* v. *Dornier, A.G., Dornier, GmbH, et al., Defendants*; *Bush Air, Inc., Plaintiff,* v. *Dornier, A.G., Dornier, GmbH, et al., Defendants*, consolidated actions for purposes of Dornier's Motion to Dismiss for Lack of Personal Jurisdiction.

APPENDIX C — Superior Court of Alaska, Fourth Judicial District, Order Denying Reconsideration, dated January 28, 1981, in *Donald E. Elliott, et al., Plaintiff,* v. *Dornier, GmbH, et al., Defendants*; *Avonna L. Sweaney, Plaintiff,* v. *Dornier, A.G., Dornier, GmbH, et al., Defendants*; *Bush Air, Inc., Plaintiff,* v. *Dornier, A.G., Dornier, GmbH, et al., Defendants*, consolidated actions for purposes of Dornier's Motion to Dismiss for Lack of Personal Jurisdiction.

JURISDICTION

The order of the court below was entered on March 24, 1981, by the Supreme Court of Alaska, the highest court of the State of Alaska

The jurisdiction of this court is invoked pursuant to 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The relevant provisions of the United States Constitution in this suit are Amendment XIV, §1, and Article 6, the Supremacy Clause. The relevant statutory provision in the Alaska Long-Arm Statute, As 09.05.015. These provisions are set forth in Appendix D.

This petition seeks review of an order of the Supreme Court of the State of Alaska dated March 24, 1981, denying Dornier's Petition for Review of a decision by the Superior Court of the State of Alaska, Fourth Judicial District at Bethel, based on Alaska's long-arm statute extending jurisdiction of that state's courts over nonresidents.

STATEMENT OF THE CASE

This litigation arises out of an air crash which occurred on April 2, 1978, near Bethel, Alaska. The aircraft involved was a Dornier Skyservant owned by Bush Air, Inc., which is also a party in the various actions hereto. Dornier, a defendant in all three actions, filed motions to dismiss for lack of personal jurisdiction in each of the three pending suits in Alaska, and those suits were subsequently consolidated for purposes of hearing Dornier's jurisdictional arguments.

Petitioner Dornier is a corporation incorporated in the Federal Republic of Germany with its principal offices in Friedrichshafen, West Germany. It has never conducted business within the State of Alaska, and has had no offices in Alaska, no property in Alaska, no agents in Alaska, no sales force in Alaska, and has had no sales revenue from Alaska. The presence in Alaska of

an airplane manufactured by Dornier is the chance of result of random resale of the aircraft and is not related to the marketing efforts of Dornier. The original sale of the subject aircraft was made f.o.b. Munich to Hamilton Aviation, a Canadian company which then delivered the aircraft to Home Oil for its commercial use in Canada, and not for purposes of resale. Payment was due and received from Hamilton in German deutschemarks at delivery in Munich. The aircraft was transported to Canada by a Danish ferry company, and during shipment the ownership and risk of loss of the aircraft was with the Canadian purchaser. After some five and one-half years of service, it was sold by Home Oil to another Canadian company, and was eventually acquired by Alaska Air Service, in Anchorage. Thereafter the subject Skyservant aircraft was sold to Bush Air operating out of Bethel, Alaska.

Dornier has never sold an aircraft in the State of Alaska, nor has it ever sold an aircraft in the Federal Republic of Germany for delivery to a purchaser in the State of Alaska. Dornier's records reflect that only three Skyservant aircraft have ever been in the service of owners and operators in the State of Alaska. All three of those aircraft were originally sold to purchasers in locations other than the State of Alaska and were for a number of years in service, owned and operated by corporations and firms in locations outside of the State of Alaska. The Skyservant aircraft which is the subject of this lawsuit was for a number of years owned, based, and operated in Canada. Of the other two Skyservant aircraft which eventually reached Alaska, one was owned, based, and operated in Caracas, Venezuela for several years, and the other owned, based, and operated in the Republic of Panama and French West Indies for

several years. The later conveyances and transactions were performed without the knowledge or consent of Dornier, and in no way have any connection with Dornier's efforts to market its own aircraft.

Dornier has furnished repair and replacement parts to Munz Northern Airlines in Alaska upon request by the purchaser. The order for those replacement parts were sent by international mail to Dornier in the Federal Republic of Germany. Dornier selected the parts for shipment to the destination specified by Munz Northern Airlines, and adhered to its policy that purchase orders outside of the Federal Republic of Germany are sold f.o.b. Munich at quoted prices on the date of delivery for shipment, with packing and transportation costs paid by the purchaser. Dornier has never had or maintained a sales office in the State of Alaska, nor has it ever had or maintained a service, repair, or parts supply facility, depot or warehouse for aircraft parts in the State of Alaska. Neither has Dornier ever authorized or directed any of its sales personnel or factory representatives to make sales calls or conduct business or travel in the State of Alaska. Dornier has not made or carried out any direct solicitation for the sale of aircraft or aircraft parts in the State of Alaska. Dornier has no manufacturing plants or facilities which it owns or operates at any location in the United States and has never owned or operated any manufacturing plants or facilities in the United States. It has never owned or operated any sales, service, or repair station or facility for its products at any location in the United States.

The Skyservant aircraft involved in this suit have not been manufactured in mass quantities which have flooded the markets of the world, nor are Dornier air-

craft available through a distributor in the State of Alaska. Only a total of 228 Skyservant aircraft have ever been manufactured and sold, and of those 121 were sold and delivered to the government of the Federal Republic of Germany. Thus there is a total of but 107 such aircraft which have ever been sold commercially.

Plaintiffs' complaints allege that the subject aircraft crash occurred near Bethel, Alaska, on April 2, 1978, and that the subject aircraft involved was designed, manufactured, and assembled by Dornier. On that basis, plaintiffs have filed complaints in the Superior Court of the State of Alaska, Fourth Judicial District at Bethel,[1] seeking damages from Dornier on bases which include negligence, warranty, and strict liability.

Petitioner Dornier initially moved for dismissal in the Elliot case on June 2, 1980, and subsequently filed motions for dismissal in the Sweaney and Bush Air cases on July 11, 1980. The motions were based upon Dornier's contentions that it was not subject to personal jurisdiction in Alaska, and that plaintiffs had failed to make adequate service of process. After briefing and oral argument, the Superior Court for the State of Alaska, Fourth Judicial District, denied Dornier's motion to dismiss on jurisdictional grounds, and held that Dornier had sufficient minimum contacts with the State

[1] Bethel is a small, remote native community on the banks of the Kuskokwim river in western Alaska, not accessable by road.

of Alaska to satisfy the due process requirements of the Fourteenth Amendment and to permit an Alaska court to acquire personal jurisdiction over Dornier via the Alaska long-arm statute.

In reaching its conclusion, the Superior Court found that at the time of the crash Dornier had a distributor for the Western United States whose territory included Alaska. Materials filed by Dornier clearly establish that the referenced distributorship agreement was never effectively implemented nor put into operation. The agreement involved was with Land/Air Sales & Leasing, Inc., a California concern, but the contract did not go into force because Land/Air failed to comply with the requirements that they purchase parts and stock-in-trade. There is no showing that Land/Air ever sent personnel into Alaska, and the agreement was cancelled by Dornier within a few months of its inception because Land/Air's failure to comply. Consequently, Dornier moved for reconsideration of its motion to dismiss alleging that the Superior Court misconstrued the status of Dornier's distributorship agreement with Land/Air Sales & Leasing, Inc., The Superior Court, however, denied Dornier's motion for reconsideration concluding, on January 28, 1981, that the subject point had been raised and considered, and was not misunderstood by the court.

On February 9, 1981, Dornier filed a petition for review with the Supreme Court of the State of Alaska, seeking reversal of the denial of its motion to dismiss for lack of jurisdiction by the Superior Court. In so doing, Dornier explicitly referenced the constitutional violations inherent in the decision of the Superior court, and ex-

pressly pointed out the inconsistency of the decision with this Court's opinion in *World-Wide Volkswagen* v. *Woodsen*. Nonetheless, the Supreme Court for the State of Alaska denied without opinion Dornier's petition for review.[2]

Dornier brings this appeal from the decision that jurisdiction can be asserted over it consistent with the due process clause of the Fourteenth Amendment to the United States Constitution.

REASONS FOR GRANTING THE WRIT

I. The Decision Of The Court Below Violated The Petitioner's Right To Due Process Of Law In That It Permitted An Assertion Of Jurisdiction Despite The Lack Of Minimum Contacts By The Defendant With The State Of Alaska.

Dornier's petition for review should be granted as a means of relieving the undue hardship and burden imposed by the decision of the courts below. The erroneous decision requires Dornier to defend an action in a forum

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[2] It should be note that there is presently pending before the Supreme Court of Alaska a second petition for review relating to the Superior Court's refusal to require discovery against Dornier to proceed in accordance with the Hague Convention of 1970 relating to the Taking of Evidence Abroad, 23 UST 2557, TIAS 7444. That treaty became effective in the United States in 1972, and is applicable in Alaska via the Supremacy Clause of the United States Constitution, Article 6 (See Appendix D). The refusal of the Alaska Court to abide by its provisions further demonstrates the prejudice to Dornier from suit in Alaska, and the need for review of the jurisdictional question.

The pending petition for review also seeks to establish that service of process over Dornier was ineffective and points out that the laws of the Federal Republic of Germany require that suits against Dornier be brought in the German court of Landgericht-Ravensburg.

far from its home, and in particular, in a forum which, based on its marketing policies, it had no reason to foresee as a situs for litigation. The expense and hardship involved in defending in Alaska are particularly significant, as inquiry into the design and manufacture of the subject aircraft will require an examination of numerous documents written in the German language and witnesses located in the Federal Republic of Germany. The subject litigation in fraught with practical problems which would plague the defense of Dornier, and which render it difficult if not impossible for Dornier to adequately defend itself in that forum.

This injustice perpetrated on Dornier is a direct violation of the due process clause of the Fourteenth Amendment to the United States Constitution, as that clause has been interpreted to require that an assertion of jurisdiction can only be made where the minimum contacts with the forum state exist. The constitutional provision stands as an important legal right of litigants throughout the United States, and the impairment of that legal right by assertion of jurisdiction in Alaska works a substantial hardship which would not exist but for the decision below. Immediate review of that decision is required in order to reaffirm the viability of those constitutional principles, and to prevent the hardship and injustice that will befall Dornier should it be required to wait until the end of the litigation in order to establish its jurisdictional arguments.

It has long been recognized that the due process clause of the Fourteenth Amendment prevents a state from acquiring jurisdiction over the person of a nonresident defendant merely by service of process upon that defedant outside of the state. A state cannot render a judgment against a nonresident in the absence of per-

sonal jurisdiction. *Schaffer* v. *Heitner*, 433 U.S. 186 (1977). Thus a state may assert long-arm jurisdiction over a nonresident defendant only if there are sufficient minimum contacts with the state "so that maintenance of the suit does not offend the traditional notions of fair play and substantial justice." *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945).

However minimal the burden of defending in a foreign court, a defendant may not be called upon to do so unless he has the requisite minimum contacts. *Hanson* v. *Denckla*, 357 U.S. 235 (1958); *Schaffer* v. *Heitner*, *supra*. *In order to establish those minimum contacts, the defendant must have done some act by which he purposefully availed himself of the privilege of conducting activities within the forum state*, thus invoking the benefits and protections of the laws of that state. *Hanson* v. *Denckla*, *supra*.

In view of the foregoing we may observe that Dornier has not transacted business within the State of Alaska. Dornier owns no property within the State of Alaska, and has no salesmen or agents within the state. The sale of the subject aircraft was consumated outside of the United States, and delivery of the product was completed outside the United States. With regard to the aircraft involved in the subject crash, Dornier had no control over subsequent random resale of the product. The presence of the subject aircraft within the State of Alaska is the chance result of a series of unrelated events and has no relation whatever to Dornier's marketing of its aircraft.

Due process analysis also involves a consideration of the overall reasonableness of subjecting a nonresident defendant to jurisdiction in a particular forum. *Amba Marketing Systems, Inc.* v. *Jobar International*, 551 F.2d

784 (9th Cir. 1977); *L. B. Reeder Contractors of Arizona* v. *Higgins Industries*, 265 F.2d 768 (9th Cir. 1959). The Ninth Circuit has enunciated the process by which jurisdictional due process questions are analyzed, 551 F.2d 784 at 789:

> Federal law is controlling on the issue of due process. It is essentially a question of whether Jobar has sufficient "minimum contacts" with Arizona such that invoking jurisdiction there would be consistent with the notions of "fair play and substantial justice." [*International Shoe, supra.*] Although under this flexible standard a case by case determination necessarily must be made, this court has adopted a basic three step analysis in making such determinations. First, the nonresident defendant must do some act or consumate some transaction within the forum, however indirect it may be. Second, the claim must be one which arises out of, or results from the defendant's activities within the forum, even if the actual claim comes to fruition in another state. Finally, the overall reasonableness of subjecting the defendant to jurisdiction of the forum's court must be considered.

The three step approach in *Amba Marketing Systems, supra*, was also applied to *Data Disc, Inc.* v. *Systems Technology Associates, Inc.*, 557 F.2d 1280 (9th Cir. 1977). A nonresident defendant was there held amenable to California jurisdiction despite the absence of substantial contacts with California. Though the defendant's contacts were not sufficiently pervasive to subject it to general jurisdiction, its participation in contract negotiations in California were sufficient to subject it to jurisdiction with regard to claims arising from that contract. Similarly, misrepresentations induced reliance

in California, thereby allowing jurisdiction over the tort claims too. Having reached this point in the analysis, the court then stated at 1288:

> We must still determine, however, whether the exercise of jurisdiction over the tort claim would be reasonable. . . . It may be unreasonable to subject an out-of-state defendant to jurisdiction where the allegedly torious act is committed outside of the forum state, having only an effect within the state, if the act is negligent rather than purposeful. *The degree to which the defendant interjects himself into the state affects the fairness of subjecting him to jurisdiction.* . . . [Emphasis added.]

The foregoing must be considered in light of a recent controlling decision by this Court, *World-Wide Volkswagen Corp.* v. *Charles S. Woodsen*, 444 U.S. 286 (1980). In that case the courts of the State of Oklahoma had asserted jurisdiction over defendants World-Wide Volkswagen Corporation and Seaway Volkswagen, Inc., despite the absence of any showing that any automobile other than the subject one in the accident had ever entered the State of Oklahoma. The Court reviewed its earlier decisions and dismissed any suggestion that all restrictions on personal jurisdiction had been removed. It stated, at 565:

> The due process clause does not contemplate that a state may make a binding judgment in personam against an individual or corporate defendant with which the state has no contacts, ties, or relations. . . . *Even if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another state; even if the forum state has a strong interest in applying its law to the controversy; even if the forum state is the most convenient location for litigation, the due process clause, acting as an instrument of interstate*

> *federalism, may sometimes act to divest the state of its power to render a valid judgment.* [Emphasis added.]

The plaintiffs had argued that it was "foreseeable" that an automobile, by its very nature, could cause injury in Oklahoma. The Court rejected that argument and stated at page 566:

> Yet "foreseeability" alone has never been a sufficient benchmark for personal jurisdiction under the due process clause. . . .
>
> This is not to say, of course, that foreseeability is wholly irrelevant. *But the foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum state.* Rather, it is that the defendant's conduct in connection with the forum state is such that he should reasonably anticipate being held into court there. . . . [Emphasis added.]

The law of *World-Wide Volkswagen* should have been determinative of the issue in this case. There were no sales of the subject aircraft in the State of Alaska, and it was not foreseeable that any of the aircraft would ever be sold in the State of Alaska in view of the petitioner's marketing policies. While it may be foreseeable that an aircraft may be flown anywhere in the world, it is not reasonable or fair for defendant Dornier to defend anywhere in the world that "unilateral activities" of others may place its aircraft. Dornier has had no contact with the State of Alaska, and its conduct did not render it foreseeable that these particular aircraft would reach the State of Alaska. The question involved here is not one of where the most convenient forum for litigation would be, but rather one relating to the power of the state to subject an alien corporation to jurisdiction merely because the plaintiffs find it convenient to do so.

Proceeding with the litigation below without first considering Dornier's position regarding personal jurisdiction would subject petitioner to an expensive and burdensome litigation that may ultimately be rendered unnecessary. Only by granting this petition for review and considering now the erroneous decision of the courts below, will Dornier be relieved of this burden and will its legal rights be recognized.

II. The Courts Of The State Of Alaska Improperly Applied The Stream Of Commerce Theory Of Jurisdiction In Violation Of This Court's Recent Decision In World-Wide Volkswagen Corporation v. Woodsen, 444 U.S. 286 (1980).

Dornier was held to jurisdiction in Alaska because, in the words of the Superior Court:

> . . .the Skyservant aircraft, manufactured in Germany by a German firm, was voluntarily placed into the worldwide stream of commerce without restriction by Dornier. Although the manufacturer did not sell the aircraft to an Alaska operator, it was foreseeable to the manufacturer that the aircraft would be operated in Alaska and could be involved in personal injury or property damage situations in the state. . . .

The foregoing is an improper application of the stream of commerce theory of jurisdiction, and its conclusion effectively eliminates all restrictions on jurisdictional assertions against manufacturers. Under that decision any manufacturer that learns that one of its products has reached a particular forum, irrespective of the means by which the product reached that destination, is subject to suit in that forum. Such a rule exceeds that state's powers as the constitutionally required minimum contacts are not present.

While AS 09.05.015(a)(4)(B) speaks of "long-arm" jurisdiction over nonresident defendants where a product has been used in the State of Alaska, this Court has held that constitutional due process requires more than mere use of a product within a state. In *World-Wide Volkswagen* v. *Woodsen, supra*, the Court stated at page 567:

> The forum state does not exceed its powers under the due process clause if its asserts personal jurisdiction over a corporation that delivers its product into the stream of commerce with the expectation that they will be *purchased* by customers in the forum state. [Emphasis added.]

No Skyservant aircraft has ever been sold in Alaska other than through random resale, and Dornier has no sales organization marketing its aircraft within the State of Alaska

That it is *marketing* activity of the manufacturer that is important to jurisdictional criteria, rather than the random activities of subsequent purchasers, was further established by this Court when it stated, in the *World-Wide* decision at 567:

> It is foreseeable that purchaser of automobiles sold by World-Wide and Seaway may take them to Oklahoma. *But the mere unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum state.* [Emphasis added.]

The jurisdictional point emphasized in *World-Wide Volkswagen* v. *Woodsen, supra*, is that foreseeability is a critical factor in any stream of commerce jurisdictional assertion. The foreseeability required is more than a mere speculative possibility must have actual knowledge, or good reason to know, that is conduct will have effect

in the forum state. *Leasco Date Processing Equipment Corp.* v. *Maxwell*, 468 F.2d 1326, 1341 (2d Cir. 1972). This Court stated in *World-Wide*, at 567:

> The foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum state. Rather, *it is that the defendant's conduct in connection with the forum state is such that he should reasonably anticipate being held into court there. . . .* [Emphasis added.]

There were no sales of the subject aircraft in the State of Alaska, nor in the United States, and consequently there was no reason for Dornier to foresee that any Skyservant aircraft would ever be sold within the State of Alaska. Dornier had no render it foreseeable that these particular aircraft would reach the State of Alaska.

Opponents of Dornier's efforts to obtain dismissal for lack of personal jurisdiction relied heavily upon the presence in Alaska of three Skyservant aircraft manufactured by Dornier. They conceded, however, that none of those aircraft were sold by Dornier to entities within the State of Alaska, and indeed, it was established that all three of the aircraft which did reach the State of Alaska were initially sold by Dornier to purchasers *outside of the United States*. Dornier had no involvement in the subsequent resales of the aircraft manufactured by it, and the fact that Dornier subsequently acquired knowledge to the effect that these three aircraft were operating in the State of Alaska is not a contact by Dornier with the State of Alaska.

Dornier had supplied replacement parts for two aircraft operating in Alaska pursuant to orders from Munz Northern Airlines forwarded via international mail to Dornier in the Federal Republic of Germany. Dornier's

policy, as utilized with regard to these transactions, was that purchases of repair or replacement parts were made "ex works", with packing and transportation costs paid by the purchaser. This is the equivalent of a sale f.o.b., which clearly demonstrates that the focus of the transaction was at the factory in West Germany. If anything, those transactions reflected contacts by Munz Northern Airlines with the Federal Republic of Germany rather than a contact by Dornier with the State of Alaska. Those sales of replacement parts were performed at the request of the purchaser, and not upon the solicitation of sale by Dornier.

Uncontradicted affidavits submitted by Dornier in connection with its motion to dismiss, and its petition for review, clearly established that though Dornier did enter into a distributorship agreement with Land/Air Sales & Leasing, Inc. of Chino, California, the distributorship arrangement never became effective because of the failure of the distributor to comply with the basic requirements of the agreement. The distributorship agreement was ineffective from its inception, and there was no sales activity under it in Alaska or anywhere else.

It follows that Dornier's marketing policy did not make it foreseeable that it might be held into suit in Alaska, and consequently the subjection of Dornier to jurisdiction in the State of Alaska is contrary to this Court's decision in *World-Wide Volkswagen* v. *Woodsen*. This Court must act and reverse the decision below to preserve the basic constitutional rights involved and to avoid erosion of the fundamental principles set forth by this Court in *World-Wide Volkswagen* v. *Woodsen*.

CONCLUSION

This case presents to the Court an opportunity to clearly articulate that stream of commerce jurisdiction applies only with regard to the marketing activities of the nonresident defendant. Misuse of the long-arm statutes where the product of a nonresident manufacturer has reached the forum state other than through its marketing activities can result in extreme unfairness and prejudice to a nonresident defendant, the burden of which is only magnified in the case of an alien defendant. The expense and hardship imposed upon defendant Dornier in this case require correction by this Court, and the refusal of the courts below to apply the law regarding jurisdiction as expressed in the opinion of *World-Wide Volkswagen* v. *Woodsen* similarly mandates immediate review.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE SUPREME COURT OF THE STATE OF ALASKA

Supreme Court No. 5787

DORNIER, A.G.., and DORNIER, GMBH, *Petitioners*

v.

DONALD E. ELLIOTT, *et al., Respondents.*

Superior Court No.
4BE 79-140 Civil
4BE 80-57 Civil
4BE 80-59 Civil

Before: Rabinowitz, *Chief Justice,* Connor, Burke, Matthews and Compton, *Justices.*

Order

On consideration of the petition for reveiw filed February 17, 1981, and the responses filed on February 19 and February 23, 1981,

IT IS ORDERED:

The petition for review is denied.

Entered by direction of the court at Anchorage, Alaska on March 24, 1981.

CLERK OF THE
SUPREME COURT

/s/ ROBERT D. BACON
ROBERT D. BACON

APPENDIX B

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
FOURTH JUDICIAL DISTRICT
AT BETHEL

No. 4BE-79-140 Civil

DONALD E. ELLIOTT and EVELYN L. ELLIOTT, individually and as Personal Representatives of the Estate of SCOTT V. ELLIOTT, Deceased, *Plaintiff,*

v.

DORNIER GMBH, a German corporation, BUSH AIR, INC., an Alaska corporation, and WIEN AIR ALASKA, INC., an Alaska corporation, *Defendants.*

No. 4BE-80-59 Civil

AVONNA L. SWEANEY, Personal Representative of the Estate of GARY B. ROBERTS, *Plaintiff,*

v.

DORNIER, A.G., DORNIER GMBH, BUTLER AVIATION COMPANY, HAMILTON AVIATION COMPANY, HOME OIL COMPANY, LIMITED, FIELD AVIATION COMPANY, LIMITED, CLIFFORD L. SHORT, RAY E. FERGUSON, FRANK P. FERGUSON, DON FERGUSON, JOE FERGUSON, DON'S SAFAIR FLYING SERVICE, KOTZEBUE FLYING SERVICE, INC., ALASKA CENTRAL AIRWAYS, INC., GEORGE GRANT, and AIRPARTS, INC. *Defendants.*

No. 4BE-80-57 Civil

BUSH AIR, INC., an Alaska corporation, *Plaintiff*,

v.

DORNIER, A.G., DORNIER GMBH, BUTLER AVIATION COMPANY, HAMILTON AVIATION COMPANY, HOME OIL COMPANY, LIMITED, FIELD AVIATION COMPANY, LIMITED, CLIFFORD L. SHORT, RAY E. FERGUSON, FRANK P. FERGUSON, DON FERGUSON, JOE FERGUSON, DON'S SAFAIR FLYING SERVICE, FERGUSON'S FLYING SERVICE, KOTZEBUE FLYING SERVICE, INC., ALASKA CENTRAL AIRWAYS, INC., GEORGE GRANT, and AIRPARTS, INC., *Defendants*.

Memorandum Decision

These cases have been joined for consideration of defendant Dornier's motion to dismiss for lack of personal jurisdiction.[1]

The litigation concerns the fatal crash of a Skyservant aircraft near Bethel, Alaska, on April 2, 1978. The aircraft was manufactured by Dornier in the Federal Republic of Germany. According to Dornier, the firm has never conducted business within the State of Alaska, it has no offices, property, agents, or sales force in Alaska and has had no sales revenues from Alaska.

The aircraft involved in this case was sold in Germany to a Canadian company which in turn delivered it to Home Oil Company of Calgary. After several years' service in Canada the plane was acquired by an Anchorage firm and was operated in Alaska from 1974 until the crash. Plaintiffs and co-defendants opposing the motion assert that personal jurisdiction over Dornier, a foreign defendant whose products

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[1] The parties have stipulated to submission of this aspect of the motion to dismiss without reference to the sufficiency of process issues.

allegedly caused injury to persons or property within Alaska, is conferred by A.S. 09.05.015, Alaska's "long-arm" statute.

Alaska's "longarm" statute has been construed by our Supreme Court to extend jurisdiction to the maximum reach consistent with due process under the Fourteenth Amendment. *Jonz* v. *Garrett/Airsearch Corp.*, 490 P.2d 1197 (Alaska 1971). Such due process standards are met when sufficient minimum contacts with the state exist "so that maintenance of the suit does not offend traditional notions of fair play and substantial justice". *International Shoe* v. *Washington*, 326 U.S. 310, 90 L.Ed. 95 (1945). The "minimum contact" requirement is satisfied in all forums where it is forseeable to the manufacturer that the product may be marketed when a manufacturer voluntarily places its product in the general stream of commerce without restriction. *Commodities World Inter'l Corp.* v. *Royal Mile, Inc.*, 440 F.Supp. 1373, 1378-79 (D.C. Puerto Rico 1977); *Gray* v. *American Radiator and Standard Sanitary Corp.* 22 Ill.2d 432, 176 N.E.2d 761 (1961): *Modern Trailer Sales, Inc.* v. *Traweek*, 561 P.2d 1192 (Alaska 1971). The stream of commerce doctrine also applies to manufacturers of component parts and manufacturers whose products are distributed by independent intermediaries. *Stephenson* v. *Duriron Co.*, 401 P.2d 423 (Alaska 1965), *cert. denied* 382 U.S. 956, 15 L.Ed.2d 360 (1965); *Volkswagenwerk, A.G.* v. *Klippan, GmbH*, 611 P.2d 498 (Alaska 1980).[2]

The opponents of the motion assert that Dornier manfactured 228 Skyservant aircraft for sale and operation generally throughout the world. To Dornier's knowledge, three Skyservant aircraft have been owned and operated in Alaska and, as to two aircraft operated by Munz Northern Airlines of Nome, Dornier has filled orders from Alaska for

[2] World Wide *Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 62 L.Ed. 2d 490 (1980), relied on by Dornier is distinguishible from this litigation for substantially the same reasons as *Klippan*, 611 P.2d at 501 n.6.

repair or replacement parts. Dornier also has provided copies of technical data and flight manual updates to operators of its aircraft in Alaska and at the time of the crash had a distributor for the western United States whose territory included Alaska.

Dornier has sought and obtained certification for the aircraft from the United States Federal Aviation Administration and its products have been advertised in publications which circulate throughout the national aviation community. Published information about the Skyservant indicates that it is used worldwide in more than 30 countries and that its STOL characteristics are suitable for short, unprepared landing strips and Arctic conditions, which are common in much of Alaska.[1] The three Skyservant aircraft known to Dornier to have been operated in Alaska were previously operated in Canada and Central and South America.

Based on the foregoing, the Court finds that the Skyservant aircraft, manufactured in Germany by a German firm, was voluntarily placed into the worldwide stream of commerce without restriction by Dornier. Although the manufacturer did not sell the aircraft to an Alaska operator, it was forseeable to the manufacturer that the aircraft would be operated in Alaska and could be involved in personal injury or property damage situations in this state. This likelihood is more than mere conjecture since for several years prior to the fatal crash Dornier knew its aircraft were operating in Alaska, it sold replacement parts to an Alaska customer and it had a distributor whose territory included Alaska.

These circumstances, coupled with the substantial factor that a fatal crash of an aircraft manufactured by Dornier occurred in Alaska allegedly causing personal injury wrongful death, damage and property loss to three Alaskan plaintiffs,

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[1] Affidavit of Phyllis C. Johnson.

constitute sufficient "mininum contacts" with the state of Alaska to satisfy the due process requirements of the Fourteenth Amendment and to permit an Alaskan court to acquire personal jurisdiction over Dornier via Alaska's "long-arm" statute, A.S. 09.05.015. Therefore, Dornier's motion to dismiss for lack of personal jurisdiction will be denied.

IT IS SO ORDERED.

DATED at Bethel, Alaska this 14th day of January, 1981.

(SEAL)

/s/ CHRISTOPHER R. COOKE
Christopher R. Cooke
Superior Court Judge

cc: files
attys

APPENDIX C

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
FOURTH JUDICIAL DISTRICT
AT BETHEL

No. 4BE-79-140 Civil

DONALD E. ELLIOTT and EVELYN L. ELLIOTT, individually and as Personal Representatives of the Estate of SCOTT V. ELLIOTT, DECEASED, *Plaintiff,*

v.

DORNIER GMBH, a German corporation, BUSH AIR, INC., an Alaska corporation, and WIEN AIR ALASKA, INC., an Alaska corporation, *Defendants,*

No. 4BE-80-59 Civil

AVONNA L. SWEANEY, Personal Representative of the Estate of GARY B. ROBERTS, *Plaintiff,*

v.

DORNIER, A.G., DORNIER GMBH, BUTLER AVIATION COMPANY, HAMILTON AVIATION COMPANY, HOME OIL COMPANY, LIMITED, FIELD AVIATION COMPANY, LIMITED, CLIFFORD L. SHORT, RAY E. FERGUSON, FRANK P. FERGUSON, DON FERGUSON, JOE FERGUSON, DON'S SAFAIR FLYING SERVICE, KOTZEBUE FLYING SERVICE, INC., ALASKA CENTRAL AIRWAYS, INC., GEORGE GRANT, and AIRPARTS, INC. *Defendants.*

No. 4BE-80-57 Civil

BUSH AIR, INC., an Alaska corporation, *Plaintiff,*

v.

DORNIER, A.G., DORNIER GMBH, BUTLER AVIATION COMPANY, HAMILTON AVIATION COMPANY, HOME OIL COMPANY, LIMITED, FIELD AVIATION COMPANY, LIMITED, CLIFFORD L. SHORT, RAY E. FERGUSON, FRANK P. FERGUSON, DON FERGUSON, JOE FERGUSON, DON'S SAFAIR FLYING SERVICE, FERGUSON'S FLYING SERVICE, KOTZEBUE FLYING SERVICE, INC., ALASKA CENTRAL AIRWAYS, INC., GEORGE GRANT, and AIRPARTS, INC., *Defendants.*

Order Denying Reconsideration

Defendant Dornier's motion for reconsideration states that the Court misconstrued the status of Dornier's distributorship agreement with Land/Air Sales and Leasing, Inc. This point was raised and considered during argument on the motion to dismiss and was not misunderstood by the Court. The significance of the distributorship agreement pertains not to whether it was "effectively implemented" or was "operative" at the time of the crash but to the forseeability of Alaska, part of the distributor's sales territory, as a forum for litigation involving Dornier's products.

The motion to reconsider this Court's decision of January 14, 1981, is without merit and is, therefore, denied.

IT IS SO ORDERED.

DATED at Bethel, Alaska this 28th day of January, 1981.

(SEAL) /s/ CHRISTOPHER R. COOKE
Christopher R. Cooke
Superior Court Judge

APPENDIX D

Constitutional Provisions

Fourteenth Amendment To United States Constitution

Section 1. . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

Article 6 Of United States Constitution

This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.

Statutes

AS 09.05.015

(a) A court of this state having jurisdiction over the subject matter has jurisdiction over a person served in an action according to the rules of civil procedure. . . .

(4) in an action claiming injury to person or property in this state arising out of an act or omission out of this state by the defendant, provided, in addition, that at the time of the injury either,

(A) solicitation or service activities were carried on in this state by or on behalf of the defendant; or

(B) product, materials or things processed, serviced or manufactured by the defendant were used or consumed in this state in the ordinary course of trade;